

Winter 2002

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Recommended Citation

Gavin M. Bowie, Rule 404(b)'s "Other Acts" Character Flaw, 54 S. C. L. Rev. 495 (2002).

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RULE 404(b)'s "OTHER ACTS" CHARACTER FLAW

I. INTRODUCTION

Rule 404 of the Federal Rules of Evidence had been constant in its role as the character evidence rule. The rule evolved from its common law origins out of a need to address the prejudicial effects of character evidence introduced to juries during trial.¹ However, the continued judicial deconstruction of Rule 404 has now intruded on what used to be its most unquestioned and unifying component: character. The change is traceable to Congress's amendment of Rule 404(b) in 1991, which added a notice requirement in criminal cases for extrinsic act evidence used during a case-in-chief, for impeachment, and for possible rebuttal.²

Prior to the adoption of Rule 404(b)'s notice requirement, there was no evident need to define the character scope of the rule's "other acts" clause because any extrinsic act evidence offered was unobjectionable, provided it was relevant to prove an element of a charged offense. However, the post-1991 Rule 404(b) jurisprudential landscape has been altered by the now-pertinent analysis of the character scope of other acts, as prompted by the interplay between the other acts clause and current notice obligations.³ Recent judicial interpretations of Rule 404(b) have illustrated the latent ambiguity of other acts when the clause is combined with the notice requirement and the rule's advisory committee notes.⁴ Despite over a decade since Rule 404(b)'s notice requirement was added, its other acts character scope remains on the evidentiary frontier. Without the benefit of case law or legal opinions for direction, the holdings of the first courts to reach this issue have been predictably troubling.

The courts are faced with deciding whether Rule 404(b) governs other acts only as they relate to character, therefore confining notice to acts that reflect on character or, conversely, whether Rule 404(b)'s other acts language encompasses all extrinsic acts of a defendant, therefore requiring notice of any

1. See generally JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL 7-6 (Student ed. 1987) ("The rule rests on the theory that the risk that the jury will convict for crimes other than those charged, or because defendant deserves punishment for his prior bad acts, outweighs the probative value of the inference, 'he's done it before, he's done or will do it again.'").

2. FED. R. EVID. 404(b) advisory committee's note.

3. See generally *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999) (illustrating an "other acts" interpretation under Rule 404(b)'s notice requirement).

4. See, e.g., Reporter's Transcript of Proceedings, *United States v. Castro-Zepeda*, No. 01CR2163-BTM (S.D. Cal. Oct. 12, 2002) (discussing the meaning of other acts and applying it to the case); *Vega*, 188 F.3d at 1150 (illustrating an other acts interpretation under Rule 404(b)'s notice requirement and using the advisory committee notes for guidance).

extrinsic act evidence the prosecution may have.⁵ The argument for a character-based analysis of other acts comes primarily from case law,⁶ legislative intent,⁷ and the context of Rule 404 itself.⁸ However, a textualist view of Rule 404(b) and its advisory committee notes suggests other acts may be inclusive of all extrinsic acts of a defendant.⁹ The resulting conflict has created a split between judicial circuits on how to correctly apply Rule 404(b)'s other acts clause.¹⁰

On the prosecutorial side, if other acts means any extrinsic act without limitation, then the concern is that evidence offered to impeach a defendant and evidence offered in rebuttal would be subject to Rule 404(b)'s notice obligations. Such an interpretation would subject the evidence to notice even though the offered evidence says nothing about the person's character or propensity to act in conformity with the charged crime.¹¹ The consequences of such a broad discovery requirement would significantly alter the prosecution's ability to effectively cross-examine a defendant. A defendant's knowledge of the full breadth of the prosecution's evidence would allow for testimony to be tailored around known facts, thereby preemptively evading potential impeachment topics. In courtrooms where the other acts clause is held to include non-character related evidence, classic impeachment by contradiction may no longer be viable if Rule 404(b) requires the disclosure of extrinsic acts, despite the inherent conflict with the rules of criminal procedure and Rules 608 and 609 of the Federal Rules of Evidence. The consequences of other acts interpretations are real and potentially staggering.

This Comment discusses Rule 404(b)'s other acts clause and the effect of the 1991 notice requirement upon it. Part II of this Comment provides background information on the role of Rule 404(b) in the Federal Rules of Evidence and details the ambiguity and effects of other acts analysis. Part III argues in favor of Rule 404(b)'s character foundation and uses the rule's 1975 enactment, the resulting 1991 amendments, and the case law leading up to and following the 1991 amendments for support. Part IV analyzes the judicial

5. Compare *Vega*, 188 F.3d at 1154 (requiring notice of all extrinsic act evidence), with *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993) (holding that defendant's invocation of Rule 404(b) to require notice of extrinsic act evidence was misplaced).

6. See generally *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997) (explaining that Rule 404(b) reflects the common law tradition preventing the introduction of character evidence because of its prejudicial effect); *Huddleston v. United States*, 485 U.S. 681, 685-86 (1988) (identifying Rule 404 as governing character evidence).

7. FED. R. EVID. 404(b) advisory committee's note ("Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence.").

8. See FED. R. EVID. 404 (containing the title "Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes").

9. The rule does not clarify what acts are to be included under the other acts clause. A plain reading, without regard for the context of 404(b) within Rule 404, suggests other acts could reasonably include all extrinsic acts.

10. See *Vega*, 188 F.3d at 1150; *United States v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995); *Beverly*, 5 F.3d at 633.

11. See Brief for Appellee United States at 23-24, *United States v. Castro-Zepeda*, No. 01-50606, 2002 U.S. App. LEXIS 23851 (9th Cir. Nov. 18, 2002).

arguments advanced for and against whether Rule 404(b)'s other acts clause should apply to acts of a defendant that have no intrinsic character connotations, and the consequences of each approach. Part V suggests a path that other acts jurisprudence should follow and concludes that interpreting other acts as inclusive of all a defendant's extrinsic acts without limitation simply misses the overarching premise of Rule 404 and its case-law progeny.

II. BACKGROUND

A. Rule 404(b): Application

In 1975, Congress enacted Rule 404(b) as a "specialized but important application of the general rule excluding circumstantial use of character evidence."¹² "Character" has been defined as "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness."¹³ Character evidence reflects uniquely on a person's acts or disposition, and issues of character evidence generally arise in the following four contexts: (1) character to infer relevant conduct of a defendant or of a victim; (2) character of a witness relevant to truthfulness; (3) evidence of acts of the defendant that reflect on character, but are offered for some purpose other than to infer conduct from character; and (4) character as an element of a claim or defense.

Rule 404(b)'s function in the Federal Rules of Evidence is to regulate the third arena of character evidence.¹⁴ Rule 404(b) establishes when a crime, wrong, or act may be admissible for some relevant purpose other than to prove character or conduct "in conformity therewith."¹⁵ For example, a prosecutor may not introduce evidence of past convictions simply to infer character propensity and to prove that a criminal defendant committed the charged crime. "The prohibition is aimed at the tactic of attempting to prove a person's actions on a particular occasion by offering evidence that the person has an ingrained propensity to act in a certain way. The forbidden inference or inferential connection is *character or propensity-conforming conduct*."¹⁶

However, Rule 404(b) allows for the admission of character-revealing evidence for other purposes, such as to prove "motivation, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," or

12. FED. R. EVID. 404(b) advisory committee's note, subdivision (b).

13. Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1232 (2001) (citations omitted).

14. See generally GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 162 (3d ed. 1996) (explaining evidence of other crimes may be admissible "if its purpose is not simply to show criminal disposition . . . but rather to prove immediately or ultimately one or more elements of the crime charged").

15. See FED. R. EVID. 404(b).

16. Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 592 (1985).

some other element of a charged offense, provided that it satisfies the usual requirements for admissibility, including relevance.¹⁷ However, it should be noted that the rule's "laundry list" is not meant to be exhaustive or exclusive.¹⁸

Rule 404(b) was first proposed in 1972 and, following amendment in 1991, now reads:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.¹⁹

As a preliminary matter, there are several judicially constructed words and phrases that cloud Rule 404(b) and have led to it being characterized as incredibly "perplexing" and "vague."²⁰ Two of these are the terms "intrinsic" and "extrinsic" acts whose distinction is critical for Rule 404(b) admissibility.²¹ Extrinsic acts are those that are completely distinct from a common nucleus of an alleged crime.²² For example, the purchase of a bicycle in 1996 is an act extrinsic to robbing a bank in 1999. For purposes of 404(b) analysis, extrinsic acts are the focus of the rule, as it seeks to keep irrelevant former acts out of current judicial proceedings to prevent any potential prejudicial effect on the jury.²³ However, an intrinsic act is one that is "inextricably intertwined" with the alleged crime.²⁴ For example, the act of paying a welder to alter a gas tank

17. See FED. R. EVID. 401, 402, 404. Rule 401 sets forth the definition of relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 401.

18. See *United States v. Sanchez*, 118 F.3d 192, 195 (4th Cir. 1997) (stating that Rule 404(b)'s list of acceptable grounds for admission of evidence "is not exhaustive," and evidence is admissible if it is necessary, reliable, and relevant to an issue other than character).

19. FED. R. EVID. 404(b).

20. Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 BYUL REV. 1547, 1562 (1998).

21. See *infra* note 25 and accompanying text.

22. See *United States v. Stouffer*, 986 F.2d 916, 926 (5th Cir. 1993) (explaining that other act evidence is not considered extrinsic when it is relevant to establish the existence of criminal conspiracy).

23. See *United States v. Manning*, 79 F.3d 212, 218 (1st Cir. 1996) (stating Rule 404(b) excludes only extrinsic evidence), *cert. denied*, 519 U.S. 853 (1996).

24. See *United States v. Williams*, 900 F.2d 823, 825 (5th Cir. 1990) ("'Other Act' evidence is 'intrinsic' when the evidence of the other act and the evidence of the crime charged are 'inextricably intertwined' or both acts are part of a 'single criminal episode' or the other acts were

in a 1990 truck to create a compartment for smuggling drugs is intrinsic to the crime of smuggling drugs in the gas tank of a 1990 truck. Rule 404(b) has no bearing on acts that are intrinsic to the charged offense, and when such evidence is offered, the evidence is not subject to Rule 404(b)'s analytical hoops.²⁵ Therefore, intrinsic acts are not excluded by Rule 404(b), while extrinsic acts are generally barred, unless introduced to prove an element of a charged offense rather than character or propensity.

The confusion surrounding the technicalities of the rule extends to the courts. Rule 404(b) has accounted for a greater number of published judicial opinions than any other provision in the Federal Rules of Evidence.²⁶ The large number of diverse legal questions that have surfaced from Rule 404(b) are now joined by another unique concern, the scope of the rule's other acts clause.

B. The Skeleton of Other Acts

Prior to the 1991 notice requirement, other acts interpretations had no place in Rule 404(b) jurisprudence because a party's objections to the introduction of extrinsic act evidence were effectively limited to when the extrinsic act only proved an element of the charged offense through an impermissible link to character propensity or the extrinsic act constituted impeachment on a collateral matter. However, with the notice requirement, the possibilities for objections to other acts evidence has grown, forcing the courts to interpret the clause.

The opening sentence of Rule 404(b) reads: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Other "crimes" and "wrongs," by their very nature, are acts which negatively reflect upon character and show an increased propensity to commit a "bad act." For example, evidence that proves a defendant previously committed bank robbery would strongly suggest negative character and a heightened propensity to commit a similar crime or wrong. Hence, the common underlying theme is that evidence of other crimes and wrongs is intertwined with character evidence because of what it reveals about the person who committed that act.

'necessary preliminaries' to the crime charged.") (citation omitted).

25. See FED. R. EVID. 404(b) advisory committee's note on 1991 amendment (stating the amended rule "does not extend to evidence of acts which are 'intrinsic' to the charged offense.") (citing *Williams*, 900 F.2d at 823); *Manning*, 79 F.3d at 218 ("[C]ases are legion in which . . . intrinsic circumstantial evidence has been admitted without occasioning either challenge or analysis under Rule 404(b)") (citation omitted); *United States v. Coleman*, 78 F.3d 154, 156 (5th Cir. 1996) (noting that intrinsic evidence does not implicate Rule 404(b)).

26. See FED. R. EVID. 404(b) advisory committee's note on 1991 amendment ("Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence."); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575 (1990) (characterizing the admissibility of uncharged misconduct evidence as the single most important issue in contemporary criminal evidence law).

When preceded by “other crimes” and “wrongs,” the phrase other acts seems out of place.²⁷ The language of Rule 404(b) raises questions. Should other acts mean other bad acts? Should it refer to other acts that reflect on character or propensity, or to all extrinsic acts committed by a defendant without limitation?²⁸ Regardless of what other acts is taken to mean, the ambiguity of the clause is apparent.

Despite its inherent vagueness and anti-contextual placement, the language “other acts” remained harmless until Rule 404(b) was amended to include a notice requirement.²⁹ According to the advisory committee notes, the 1991 notice requirement was introduced as an effort to “reduce surprise and promote early resolution on the issue of admissibility.”³⁰ In defining the parameters of its notice provision, the committee required pretrial notice of available Rule 404(b) evidence, but allowed for the admissibility of Rule 404(b) evidence during trial when reasonable, depending “largely on the circumstances of each case.”³¹

The impact that the notice requirement was intended to have on criminal prosecutions is unmistakable, but the dawning confusion over other acts evidence was sewn into the legal fabric by a paragraph in the advisory committee’s note on the 1991 amendment:

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, *i.e., during its case-in-chief, for impeachment, or for possible rebuttal*. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.³²

In so stating, the committee blurred the line of when, or if, notice is required for other acts. The resulting problems are, first, that the character scope of other acts is undefined and, second, that there is a question of whether the notice requirement should apply to extrinsic evidence offered to rebut testimony or

27. See FED. R. EVID. 404(b).

28. See *United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) (requiring notice of all extrinsic act evidence); *United States v. Williams*, 900 F.2d 823, 826 n.2 (5th Cir. 1990) (“‘Other act’ extrinsic evidence need not be evidence of other *wrongful* acts but may be evidence of any extrinsic acts relevant to the criminal act charged.”) (citation omitted).

29. See, e.g., *Vega*, 188 F.3d at 1150 (interpreting the clause under the notice requirement).

30. FED. R. EVID. 404(b) advisory committee’s note on 1991 amendment.

31. *Id.*

32. *Id.* (emphasis added).

to impeach by contradiction, as the rule implies and the advisory committee notes state.

For example, consider a situation in which a defendant is on trial for stealing a car in Atlanta. On cross-examination, the prosecutor asks him whether or not it is true that he bought groceries in Atlanta the day before the crime. The defendant then testifies to an alibi that places him in Dallas for five days leading up to the crime. In response, the prosecution introduces surveillance videotape from a grocery store conclusively establishing the defendant's presence in Atlanta the day before the crime. The defendant objects to the admissibility of the videotape on Rule 404(b) grounds, believing the prosecution failed to give notice in accordance with the rule. Inherent in the court's analysis of whether the evidence is governed by Rule 404(b) are the two problems produced by the advisory committee notes to the amended rule, as mentioned above.

The first question is whether the videotape constitutes evidence of other acts under Rule 404(b) if it only shows the defendant buying groceries—an act reflecting neutrally on character. The second issue is whether Rule 404(b) applies when the evidence is introduced to impeach by contradiction. These questions form the critical mass of other acts analysis and, ironically, are the product of the advisory committee's attempts to clarify the amendments to Rule 404(b). There are essentially two ways to read other acts under the amended rule. One requires notice of all acts of a defendant,³³ and the other limits notice to acts that reflect on character.³⁴ It is as simple and as complicated as that.

To further understand these issues, consider another situation in which a defendant takes the stand in a federal criminal trial for drug trafficking and testifies on direct examination that he has never met or known of person X. The prosecution has evidence showing a close friendship between the two, which it attempts to enter on cross-examination and later in rebuttal without giving prior notice to the defense. Assuming the evidence is relevant and reflects neutrally on the defendant's character, then there is an issue of whether the evidence is properly admissible to impeach the witness' testimony. Subscribers to a textualist interpretation of Rule 404(b) would surprisingly say no.³⁵

Looking strictly at the facts, the defendant's relationship with X is not a crime or wrong under Rule 404(b), but it can be interpreted as an other act, placing the defendant's relationship with X under the umbrella of the rule. A textual reading of the rule finds the language "[e]vidence of other crimes, wrongs or acts"³⁶ devoid of an explicit character requirement, seemingly

33. See *Vega*, 188 F.3d at 1154. In holding all extrinsic acts are other acts for Rule 404(b) purposes, the court established that all acts are subject to notice, regardless of character. *Id.*

34. See *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993).

35. See *Vega*, 188 F.3d at 1154; Reporter's Transcript of Proceedings at 551, *United States v. Castro-Zepeda*, No. 01CR2163-BTM (S.D.Cal. Oct. 12, 2002).

36. FED. R. EVID. 404(b).

justifying the inclusion of the relationship as an other act, despite its failure to speak to character or propensity. Under the plain language of the advisory committee notes on the 1991 amendment, *all* extrinsic act evidence offered for impeachment or for possible rebuttal requires disclosure to the defense within a reasonable amount of time. In the example above, no notice was given, so under a textual interpretation of the rule and its advisory committee notes, the prosecution would not be allowed to contradict the defendant's testimony with evidence of the relationship.

Contrary to the textualist view is the position that (1) the evidence should be admissible as classic impeachment by contradiction, unless the defendant's relationship with X is a collateral matter,³⁷ and (2) the defendant's relationship with X is not governed by Rule 404(b) because it says nothing about his character or propensity. First, the argument is that, in situations where the prosecution has evidence of extrinsic acts demonstrating that a defendant's trial testimony is false, neither Rule 404(b) nor Rules 608 and 609 should apply.³⁸ Impeachment by contradiction may be properly introduced in either cross-examination or in rebuttal without regard to either rule. Secondly, it is misguided to argue that Rule 404(b) applies to a relationship between the defendant and X which does not reflect upon character or propensity. While the exact text of Rule 404(b) does not describe other acts that reflect upon character, it is difficult to ignore the context of other acts in the rule. "Other acts not admissible to prove character" implies that the other act, when included in the reference to "It" in the second sentence, must be an act with the

37. See FED. R. EVID. 608(b). No specific rule governs impeachment by contradiction, but Rule 608 governs impeachment by character evidence and thus provides some direction.

38. Rules 608 and 609 govern the manner in which a witness's character for untruthfulness may be established in order to impeach the witness. Rules 608 and 609 read, in relevant part, as follows:

Rule 608. Evidence of Character and Conduct of Witness.

....

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

....

Rule 609. Impeachment by Evidence of Conviction of Crime.

....

(1) . . . evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

potential to reflect on character.³⁹ Further, Rule 404(b)'s common law precursor, legislative intent, and case law support the rule's application to character revealing evidence.⁴⁰ Therefore, under this argument, Rule 404(b)'s application is limited to character revealing acts, and other acts should properly be interpreted as other acts that offer a character or propensity inference.

Each interpretation of Rule 404(b) is based in respectively divergent, but acceptable, paths of the law.⁴¹ Consequently, the courts have struggled with how to reconcile the plain wording of Rule 404(b) and its advisory committee notes with its appropriate and, some would argue, intended effect.⁴²

A review of the case law indicates that other acts evidence problematically collides with the 1991 notice requirement in certain predictable situations. Such a situation occurs when: (1) the case is a criminal trial; (2) the prosecution obtains evidence of an extrinsic act that has no intrinsic character or propensity connotations within the context of a given case; (3) the prosecution does not provide notice of the evidence to the defense because it is either immaterial to its case-in-chief or the prosecution chooses to strategically hold it for impeachment or rebuttal; (4) the defendant takes the stand and gives exculpatory testimony; (5) the prosecution either attempts to impeach the defendant on cross-examination with the undisclosed evidence or attempts to offer the evidence on rebuttal to refute the defendant's testimony; and (6) the defense objects on Rule 404(b) notice requirement grounds. In such a context, a court is required to interpret the character parameters of Rule 404(b)'s other acts clause.

III. RULE 404(b)'S CHARACTER FOUNDATION

The appropriate application of Rule 404(b)'s other acts should first be dissected by a review of its character construction, as established by the rule's common law heritage, legislative intent, and case law. In looking at the rule's evolution, evidence reflecting upon character is impliedly necessary for other acts application.

39. FED. R. EVID. 404(b).

40. See *infra* discussion Part III and accompanying text.

41. Compare *United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) (requiring notice of all extrinsic act evidence), with *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993) (holding that defendant's invocation of Rule 404(b) to require notice of extrinsic act evidence was misplaced).

42. See Brief for Appellee *United States* at 21, *United States v. Castro-Zepeda*, No. 01-50606, 2002 U.S. App. LEXIS 23851 (9th Cir. Nov. 18, 2002).

A. Character Beginnings

Rule 404 is known as the character evidence rule⁴³ and sets forth the general proposition that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith.”⁴⁴ The rule is inseparably associated with character, as evidenced in part by its title: “Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes.” Prior to the enactment of the Federal Rules of Evidence in 1975, character evidence was governed by common law.⁴⁵ In *Michelson v. United States*⁴⁶ Justice Jackson explained the policy behind common law character evidence regulation:

The state may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.⁴⁷

43. See *Old Chief v. United States*, 519 U.S. 172, 181-82 (1997); *Huddleston v. United States*, 485 U.S. 681, 685-86 (1988).

44. FED. R. EVID. 404(a) (stating this general rule followed by exceptions for evidence of a pertinent trait of the accused or of an alleged victim). Rule 404(a) reads as follows:

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

Id.

45. See generally *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (identifying the common law tradition excluding character evidence).

46. *Id.*

47. *Id.* at 475-76 (citations omitted).

The common law precursor to Rule 404(b) is defined as follows: "The doing of another criminal act, not a part of the issue, is . . . not admissible as evidence of the doing of the criminal act charged, except when offered for the specific purpose of evidencing Design, Plan, Motive, Identity, Intent, or other relevant fact . . . distinct from Moral Character."⁴⁸ Inherent in the common law predecessors of Rule 404 is the consideration that character evidence is a powerful prosecutorial tool that must be regulated by the imposition of judicial or statutory checks.

Subdivision (b) of the advisory committee notes of Rule 404 cite to Slough and Knightly's article, *Other Vices, Other Crimes*,⁴⁹ which describes the common law prohibition of using character evidence to show that a defendant is a bad person and, therefore, likely to have committed the charged crime.⁵⁰ The committee's reliance on this article is another vivid indicator of Rule 404(b)'s foundational link to character evidence.

In summary, a review of the rule's title, its text, the common law, and the rule's committee notes demonstrates that Rule 404(b) was enacted to regulate character evidence and not evidence unrelated to character.

B. Character in the Courts

Applying Rule 404(b), the U.S. Supreme Court has followed the intent of the rule's drafters and its common law heritage by promoting the character backbone of the rule. In *Huddleston v. United States*⁵¹ the Court stated:

Federal Rule of Evidence 404(b)—which applies in both civil and criminal cases—generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's *character*, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than *character*.⁵²

Huddleston points out that the rule involves extrinsic act evidence that offers some inference of character or propensity.

48. JOHN HENRY WIGMORE, WIGMORE'S CODE OF THE RULES OF EVIDENCE IN TRIALS AT LAW § 356 (3d. ed. 1942).

49. M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325 (1956).

50. *Id.*

51. 485 U.S. 681 (1988).

52. *Id.* at 685-86 (emphasis added).

In *Old Chief v. United States*⁵³ the Supreme Court reiterated the vital role of acts inferring character for Rule 404(b) application. Although not at issue in the case, Justice Souter discussed the rule's character link through a discussion of common law character evidence.⁵⁴ The Court again surmised that Rule 404(b) "reflects the common law tradition" disallowing prosecutorial reliance upon any kind of *character* evidence to establish the probability of a defendant's guilt.⁵⁵

In addition, although not addressing the scope of other acts, every judicial circuit to address the rule's "other crimes" and "wrongs" has recognized that the rule is invoked when character revealing evidence is introduced to prove some element of a charged crime.⁵⁶ Thus, while the cases in which the circuits ruled on the character relation of the rule do not specifically address the full spectrum of "other crimes, wrongs, or acts" and, therefore, do not speak to the scope of other acts, they are another indication of the rule's application solely to evidence that reflects on character.

The steadfast role of character in Rule 404(b) led courts to consistently limit its analysis to evidence of the defendant's character or propensity to act in conformity with bad character. The character requirements of Rule 404(b) appeared ingrained in the case law, as well as in the title, text, and common law history of the rule.

53. 519 U.S. 172 (1997).

54. *Id.* at 180-82.

55. *Id.* at 181. The Court in *Old Chief* agreed with the defendant's argument that it is wrong to allow a defendant's earlier bad acts to be generalized into bad character. *Id.* at 180. The Court agreed with the defendant's argument by explaining the common law tradition of Rule 404(b). *Id.* at 181. However, the Court ultimately reached its evidentiary decision on Rule 403 grounds, rendering its discussion of Rule 404(b) superfluous to the general facts presented. *Id.* at 182-83. Nevertheless, the Court's treatment of the issue is revealing as to character's role in Rule 404(b).

56. See, e.g., *United States v. Rawle*, 845 F.2d 1244, 1247 (4th Cir. 1998) (holding Rule 404(b) extrinsic evidence must "tend[] to impugn a defendant's character"); *United States v. Stevens*, 83 F.3d 60, 68 (2d Cir. 1996) (applying Rule 404(b) to "prior bad acts"); *United States v. Tutiven*, 40 F.3d 1, 5 (1st Cir. 1994) (applying Rule 404(b) to evidence which shows a defendant's "criminal propensity or bad character"); *Gov't of the Virgin Islands v. Archibald*, 987 F.2d 180, 184 (3d Cir. 1993) ("Rule 404(b) applies to any extrinsic acts that might adversely reflect on the actor's character."); *United States v. Kendall*, 766 F.2d 1426, 1436 n.5 (10th Cir. 1985) (stating that an act need not be criminal but must tend to "impugn defendant's character" in order to fall within Rule 404(b)); *United States v. Terebecki*, 692 F.2d 1345, 1348 n.2 (11th Cir. 1982) (holding act need not be criminal but must tend to impugn defendant's character to invoke Rule 404(b)); *United States v. Cooper*, 577 F.2d 1079, 1087-88 (6th Cir. 1978) ("Conceivably within the broad language of the rule is any conduct of the defendant which may bear adversely on the jury's judgment of his character."); *United States v. Miller*, 573 F.2d 388, 392 n.6 (7th Cir. 1978) ("The addition of 'or acts' simply broadens the class of items that cannot be admitted to show a defendant's propensity to commit crime" and the acts must be "wrongful."); *United States v. Cook*, 557 F.2d 1149, 1152 (5th Cir. 1977) (holding that the act must be wrongful or related in nature to the present charge in order to qualify as an act under the rule).

IV. RULE 404(b)'s "OTHER ACTS" APPLICATION IN PRACTICE

The Supreme Court's⁵⁷ and most judicial circuits'⁵⁸ acceptance of Rule 404(b)'s application to acts that reflect on character is now subject to challenge by the previously ignored scope of other acts.⁵⁹ Although the other acts clause was present in the original adoption of Rule 404(b) in 1975, only recently have a handful of federal courts begun to meaningfully address its scope.⁶⁰ The case law reveals the burgeoning confusion of courts asked to interpret Rule 404(b), its advisory committee notes, and how, when added to the pieces of criminal procedure and established trial procedure, the other acts evidentiary puzzle fits together.

A. *Case Law: Other Acts Without Character Limitation*

In *United States v. Vega*⁶¹ the Ninth Circuit Court of Appeals was the first to remove character from Rule 404(b) analysis. The defendant, Hermelinda Vega, was arrested at the Calexico, California, Port of Entry while attempting to cross from Mexico into the United States with 89.8 pounds of marijuana hidden in her van.⁶² Prior to trial, Vega properly requested that all other acts evidence be disclosed pursuant to Rule 404(b).⁶³ The prosecution responded that it was not aware of any such evidence.⁶⁴ During trial, Vega testified that she had no knowledge of any marijuana or other controlled substance concealed in her van upon entering the United States.⁶⁵ While on the stand, Vega professed that the reason she had traveled to Mexico was because of an extramarital affair with a person residing in Mexico.⁶⁶

On cross-examination, the prosecutor asked her about certain previous trips to Mexico, all of which were followed by substantial cash deposits to her bank account.⁶⁷ Vega admitted to these prior trips and deposits.⁶⁸ Following the close of Vega's defense, the prosecutor called two witnesses on rebuttal, a customs inspector and a custodian of records from Vega's bank.⁶⁹ The witnesses

57. See *Old Chief v. United States*, 519 U.S. 172, 181 (1997); *Huddleston v. United States*, 485 U.S. 681, 685-86 (1988).

58. See *supra* note 57.

59. See, e.g., *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999) (holding that other acts is inclusive of all extrinsic acts).

60. See *id.*; *United States v. Tomblin*, 46 F.3d 1369 (5th Cir. 1995); *United States v. Beverly*, 5 F.3d 633 (2d Cir. 1993).

61. 188 F.3d at 1150.

62. *Id.* at 1152.

63. *Id.* at 1153.

64. *Id.*

65. *Id.* at 1152-53.

66. *Id.* at 1153.

67. *Vega*, 188 F.3d at 1153.

68. *Id.*

69. *Id.*

testified consistently with Vega's admissions but with more specificity that, based on electronic records, Vega had in fact crossed the border on several previous occasions and that her crossings were followed by large cash deposits into her bank account.⁷⁰ The district court found Vega guilty of importation of marijuana, possession of marijuana, and aiding and abetting.⁷¹ She appealed and claimed that the court erred in admitting evidence of her prior border crossings and bank deposits.⁷² Vega argued the prosecution failed to give pretrial or timely notice as mandated by the 1991 amendment to Rule 404(b).⁷³

On appeal, the Ninth Circuit vacated the conviction and remanded the case for a new trial, holding that notice should have been given pursuant to Rule 404(b) for both the prior border crossings and the bank deposits.⁷⁴ The court stated:

First, we examine whether evidence of Vega's prior border crossings and bank deposits is other acts evidence subject to the provisions of Rule 404(b). We conclude that it is. *As an initial matter, we note that this rule applies to all "other acts," not just bad acts.* Thus, despite the fact that there is nothing intrinsically improper about Vega's prior border crossings or bank deposits, they are nonetheless subject to 404(b).⁷⁵

The court's interpretation of Rule 404(b) was guided by its view of the following three elements that demonstrate compliance with Rule 404(b) disclosure: (1) whether the accused made a Rule 404(b) request; (2) whether the prosecution intended to introduce this evidence at trial; and (3) if so, whether the prosecution provided reasonable notice.⁷⁶ "It is of no consequence that the government did not know with absolute certainty that it would introduce that evidence until the defendant took the stand. The rule mandates that the government provide notice even if the government intends to introduce the evidence for impeachment or for *possible* rebuttal."⁷⁷ The court held that the first two requirements were answered affirmatively, and the prosecution's failure to provide reasonable notice led the court to vacate Vega's conviction.⁷⁸

A closer look at *Vega* reveals that the breadth of its holding on other acts is distinct from the facts. The evidence introduced obviously presents negative character inferences. The clear inference for the jury was that, on several

70. *Id.*

71. *Id.* at 1152.

72. *Id.*

73. *Vega*, 188 F.3d at 1152.

74. *Id.* at 1152, 1155.

75. *Id.* at 1154 (citations omitted) (emphasis added).

76. *Id.*

77. *Id.*

78. *Id.* at 1155.

previous occasions, Vega had brought back something to sell in the United States. From this inference, the jury could deduce that the crime charged was part of an ongoing criminal venture to import marijuana. This possible inference establishes that the evidence was extremely prejudicial.⁷⁹ Accordingly, the extrinsic act evidence in *Vega* was appropriately held to be under the governance of Rule 404(b) because it reflected on character and was introduced to prove an element of the charged crime separate from character or propensity. However, the way the issue was presented to the court of appeals by the prosecution is that in an of itself, there are no intrinsic character connotations associated with crossing the border or making bank deposits—they are both acts reflecting neutrally on character.⁸⁰

The court of appeals responded to this issue by going outside the scope of the argument.⁸¹ The court stated that it is *completely* irrelevant whether or not the other acts in question are character-neutral acts because, “[a]s an initial matter, we note that this rule applies to *all* ‘other acts,’ not just bad acts.”⁸² A more appropriate treatment of the issue would have limited the court’s analysis to whether the particular acts in question were properly under Rule 404(b). The court did not need to proceed any further. The court’s proclamation of the rule’s governance over infinite other acts is substantially broader than the scope of the issue before it and may arguably be considered dictum. But regardless of how the court of appeals reached its interpretation of other acts, the lesson of *Vega* comes from the expanse of its language and its effect on trial procedure. The holding of the court of appeals infinitely broadened the scope of 404(b)’s other acts. In *Vega* the Ninth Circuit established that *any* extrinsic act, without limitation, regardless of whether or not it speaks to character or propensity, is now subject to notice by the prosecution under the 1991 amendment to Rule 404(b):

The *Vega* court’s view was followed by the U.S. District Court in the Northern District of Illinois, Eastern Division, in two 2000 decisions.⁸³ First, in *United States v. Lim*⁸⁴ the court cited *Vega* and supported the Ninth Circuit’s characterization of Rule 404(b).⁸⁵

The Court directs the government to disclose not only *all* other act evidence that it intends to offer in its case in chief, but also any such evidence that it intends to offer to impeach any witness (including the defendant) or in rebuttal. The

79. See *Vega*, 188 F.3d at 1153-54.

80. *Id.*

81. See *id.* at 1153 (holding that rule 404(b) applies to all other acts).

82. *Id.* at 1154 (emphasis added).

83. See *United States v. Siegfried*, No. 99-CR-752, 2000 WL 988164 (N.D. Ill. July 18, 2000); *United States v. Lim*, No. 99-CR-689, 2000 WL 782964 (N.D. Ill. June 15, 2000).

84. 2000 WL 782964.

85. *Id.* at *2.

Advisory Committee Notes to Rule 404(b) make it clear that this is what the 1991 amendment requires.⁸⁶

In so stating, another federal court held that any impeachment of a defendant through other acts was governed by Rule 404(b)'s notice requirement, again removing any character revealing requirement from 404(b) evidence based on the recommendations of the advisory committee notes.

In addition, the court acknowledged the unavoidable conflict between Rules 608(b) and 404(b) and effectively held that Rule 404(b)'s notice requirement takes precedence over the provisions of 608(b):

However, to the extent that evidence to be used to impeach under Rule 608(b) constitutes "other act" evidence within the meaning of Rule 404(b) and the 1991 Advisory Committee Notes, the fact that it might also be admissible under Rule 608(b) will not excuse the government from producing it prior to trial pursuant to the Court's ruling on defendant's motion for disclosure of other act evidence.⁸⁷

Subsequently, in *United States v. Siegfried*⁸⁸ the district court continued its support of *Vega* when it similarly held that other act evidence used to impeach a defendant must be disclosed.⁸⁹

The impact of the *Vega* decision surfaced with full force in the U.S. District Court for the Southern District of California in *United States v. Castro-Zepeda*.⁹⁰ The defendant, Castro-Zepeda, was arrested when he attempted to cross into the United States from Mexico with 36.08 pounds of marijuana hidden inside a modified gas tank.⁹¹ As in *Vega*, the defense again properly asked for pretrial discovery of all Rule 404(b) evidence.⁹² Then, in its opening statement, the defense claimed Castro-Zepeda was set up by an associate named Felix Tirado.⁹³ Upon taking the stand, the defendant described his relationship with Tirado.⁹⁴ Castro-Zepeda explained that he believed Tirado was responsible for altering the gas tank and for placing marijuana inside it with the intent of having it transported into the United States without the defendant's knowledge.⁹⁵ On cross-examination, the prosecution further

86. *Id.* (emphasis added).

87. *Id.*

88. 2000 WL 988164.

89. *Id.* at *4.

90. *United States v. Castro-Zepeda*, No. 01CR2163-BTM (S.D. Cal. Oct. 12, 2002).

91. See Brief for Appellee United States at 3-4, *United States v. Castro-Zepeda*, No. 01-50606 (9th Cir. Nov. 18, 2002).

92. Reporter's Transcript of Proceedings at 468, *United States v. Castro-Zepeda*, No. 01CR2163-BTM (S.D. Cal. Oct. 12, 2002).

93. *Id.* at 326-32.

94. *Id.* at 401-07.

95. *Id.* at 412-15.

inquired about the defendant's association with Tirado.⁹⁶ The prosecution asked him if there had been any subsequent contact between himself and Tirado since the arrest.⁹⁷ Castro-Zepeda responded that his friendship with Tirado was over because he was angry with Tirado for setting him up and that he had not had any subsequent contact with Tirado.⁹⁸

At this point, the prosecution attempted to introduce a certified California Department of Motor Vehicles record into evidence, which stated that the defendant had sold Tirado one of his personal cars ten days after the arrest.⁹⁹ The prosecution would have thereby impeached the defendant's statements and would have effectively refuted Castro-Zepeda's defense. The defendant objected to the entire cross-examination based on Rule 404(b) and *Vega*.¹⁰⁰

The district court considered the objection outside the presence of the jury and eventually ruled that whether Castro-Zepeda sold a car to Tirado was other act evidence governed by Rule 404(b).¹⁰¹ Consequently, because the prosecution failed to notify the defense of the evidence, it was held inadmissible under the rule.¹⁰²

Following Castro-Zepeda's testimony, the court declared a mistrial.¹⁰³ Then, Castro-Zepeda made a motion to dismiss the indictment on double jeopardy grounds.¹⁰⁴ The district court denied the motion, granted a stay, and the parties appealed the rulings of the court.¹⁰⁵ The Ninth Circuit summarily affirmed the district court's ruling.¹⁰⁶

96. *Id.* at 427-28.

97. *Id.* at 427.

98. Reporter's Transcript at 427, *Castro-Zepeda* (No. 01CR2163-BTM).

99. *Id.* at 430-31.

100. *Id.* at 431-32, 466.

101. *Id.* at 466-96, 551.

102. *Id.* at 551.

103. Brief for Appellee at 3, *Castro-Zepeda* (No. 01-50606).

104. *Id.*

105. Reporter's Transcript at 554, *Castro-Zepeda* (No. 01CR2163-BTM).

106. *United States v. Castro-Zepeda*, No. 01-50606, 2002 U.S. App. LEXIS 23851 (9th Cir. Nov. 18, 2002). In a footnote to its unpublished opinion, the Court of Appeals stated:

We decline to accept the government's invitation that we reexamine and clarify the scope of our decision in *United States v. Vega*, 188 F.3d 1150 (9th Cir. 1999), which addresses Rule 404(b) of the Federal Rules of Evidence We comment only that we see no prosecutorial misconduct or intentional impropriety in the failure to disclose impeachment evidence that was held by the district court to contravene Rule 404(b).

Id. at *3. However, the district court judge had noted,

Maybe even the Court of Appeals will say under the circumstances this is not the type of thing that has to be disclosed under 404(b). That is not the way I read the situation, but I think further guidance from them would be really helpful in trying a lot of these cases, and maybe we will get an answer. . . . I don't think people understand that the *Vega* case and Rule 404(b) and the committee notes for 404(b) mean that even if you are going to use it to impeach in cross-examination, you have to disclose it in advance.

I think this case will send a message out

Reporter's Transcript at 552-53, *Castro-Zepeda* (No. 01CR2163-BTM).

Castro-Zepeda is significantly different from *Vega* for Rule 404(b) purposes. In *Vega* the introduction of border crossings and cash deposits as evidence was likely governed by the rule because it resulted in prejudicial character inferences. However, in *Castro-Zepeda* the maximum scope of the *Vega* holding was applied to evidence which truly had no reflection on the defendant's character. The sale of a car to Felix Tirado reveals nothing about character or propensity, nor was it an act done in furtherance of a criminal scheme. The Department of Motor Vehicles record proffered in *Castro-Zepeda* does nothing more than prove the defendant lied about his association with Tirado. Although the holding of *Vega* imputed little harm to the interested parties due to other facts of the case,¹⁰⁷ the result of the Ninth Circuit's interpretation of other acts, as applied in the context of *Castro-Zepeda*, is egregious. *Castro-Zepeda* is therefore illustrative of the damaging effects of *Vega*'s overbroad other acts scope.

B. Case Law: "Other Acts" Confined

*United States v. Beverly*¹⁰⁸ is in contrast to the *Vega* decision. There, the Second Circuit held that evidence offered to impeach a defendant or offered in rebuttal does not fall under Rule 404(b) or Rule 608.¹⁰⁹ The defendants in *Beverly* were allegedly involved in a conspiracy to sell crack cocaine and were indicted on various charges, including firearms violations.¹¹⁰ During trial, one of the defendants, Charles Tyrone White, took the stand and asserted on both direct and cross-examination that he had never possessed a gun in Albany, New York.¹¹¹ He also maintained that his only experience with a gun came at a firing range as part of his employment as a security guard and, further, that he was not in Albany on March 28 or March 29 of 1991.¹¹² Subsequently,

[o]n cross-examination, the government questioned White regarding several prior incidents in which he allegedly possessed and used firearms. Through cross-examination and on rebuttal, the government introduced evidence [that] White committed two shootings in Albany on March 28 and March 29, 1991. At the time of trial, state charges against White arising from these shootings were pending.¹¹³

107. The broad scope of the court's ruling was inconsequential to the parties because the acts in question reflected upon character and triggered Rule 404(b) application.

108. 5 F.3d 633 (2d Cir. 1993).

109. *Id.* at 639.

110. *Id.* at 636.

111. *Id.* at 640.

112. *Id.*

113. *Id.*

Thus, in response to White's testimony, the prosecution introduced extrinsic act evidence to impeach his statements. White was subsequently convicted of several firearms violations and other charges, from which he appealed.¹¹⁴

On appeal, White argued that the evidence implicating him in the Albany shootings was admitted in violation of Rules 404(b) and 608(b).¹¹⁵ The Second Circuit rejected this argument because "[t]he government's questioning arose in the form of impeachment of specific falsehoods, not as an attack on his general character for truthfulness, Fed. R. Evid. 608(b), nor as an attempt to prove his bad character in order to show he acted in conformity therewith, Fed. R. Evid. 404(b)."¹¹⁶ The court further explained its decision:

"Central to the proper operation of the adversary system is the notion that 'when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.'" Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied. Where a defendant testifies on direct about a specific fact, the prosecution is entitled to prove on cross-examination that he lied as to that fact. The same holds true for defendant's false statements on cross-examination. Finally, the government's opportunity to impeach the defendant's credibility once he has taken the stand includes the opportunity to use evidence that it was barred from using on its direct case.¹¹⁷

In rejecting White's argument, the court declined to adopt a textualist interpretation of Rule 404(b) and its notice requirement. Instead, the court recognized the necessity of cross-examining specific falsehoods.

The conclusions of the *Beverly* court conflict with the holdings of *Vega* and *Castro-Zepeda*. While *Beverly* does not specifically address the character requirements of Rule 404(b)'s other acts, it does provide a sensible description of the consequences of other acts interpretations.¹¹⁸ In both *Vega* and *Castro-Zepeda* the consequence of the courts' interpretations was an inability to impeach defendants. *Beverly* stands in stark contrast to these cases and emphasizes the absurdity of denying effective cross-examination through Rule 404(b)'s notice requirement. *Beverly* supports the merits of classic

114. *Beverly*, 5 F.3d at 636.

115. *Id.* at 639.

116. *Id.*

117. *Id.* at 639-40 (citations omitted).

118. *See id.* at 633 (advocating the need for effective cross-examination despite the plain language requirements of Rule 404(b)).

impeachment by contradiction when other acts introduced as evidence did not “attempt to prove . . . character.”¹¹⁹

The Fifth Circuit has also addressed the interplay between Rules 404(b) and 608(b) in *United States v. Tomblin*.¹²⁰ In this case, the defendant was convicted of bribery, extortion, and other offenses.¹²¹ The defendant took the stand, and on cross-examination, the prosecution questioned him about alleged acts of misconduct.¹²² The defense objected to the prosecution’s introduction of other acts evidence for the purpose of impeachment on Rule 404(b) grounds.¹²³ In response, the court stated:

Whether Rule 404(b) or Rule 608(b) applies to the admissibility of other-act evidence depends on the purpose for which the prosecutor introduced the other-acts evidence. Rule 404(b) applies when other-acts evidence is offered as relevant to an issue in the case, such as identity or intent. Rule 608(b) applies when other-acts evidence is offered to impeach a witness, “to show the character of the witness for untruthfulness,” or to show bias.

. . . .
[T]he prosecutor’s questions were probative of Tomblin’s character for truthfulness and were permissible under Rule 608(b). *Accordingly, we conclude that the provision of Rule 404(b) that requires the prosecutor to give notice of his intention to use other-acts evidence does not apply here.*¹²⁴

The *Tomblin* court notably chose not to apply the notice requirement to extrinsic act evidence, which, under *Vega*, would be inadmissible without notice. In doing so, the court strongly suggests that the notice requirement is not a bar to admissibility when evidence is properly admissible on other grounds.

Tomblin makes a significant distinction between the rules of evidence—a distinction which is not present in the *Vega* court’s resolution of the issue. *Tomblin* is also unmistakably in direct conflict with *Lim*’s holding that Rule 404(b) trumps Rule 608(b).¹²⁵ The absolutism of other acts disclosure evident in the Ninth Circuit and the District Court for the Northern District of Illinois

119. *Id.* at 639.

120. 46 F.3d 1369 (5th Cir. 1995).

121. *Id.* at 1374.

122. *Id.* at 1388.

123. *Id.*

124. *Id.* at 1388-89 (citations omitted) (emphasis added).

125. See *United States v. Lim*, No. 99-CR-689, 2000 WL 782964 at *2 (N.D. Ill. June 15, 2000).

is conspicuously absent from the Fifth Circuit's ruling on the issue.¹²⁶ In analyzing these cases, it is readily apparent that the other acts interpretation under the notice requirement is markedly different among the circuits that have reached the issue.

C. Consequences

The impact of other acts interpretations becomes clear after comparing *Beverly* and *Tomblin* with *Vega*'s interpretation of Rule 404(b). Under *Vega*'s reading, other acts evidence is not admissible unless proper notice is given.¹²⁷ Prior to *Vega*, prosecutors had the ability to strategically protect other acts evidence before and during trial, which allowed them to anticipate a defendant's testimony or alibi and contradict it with evidence the defendant did not know existed.¹²⁸ Under *Vega*, the all-encompassing notice requirement allows a defendant to tailor testimony around the knowledge of every piece of evidence a prosecutor has at his or her disposal, which all but eliminates the opportunity for an effective cross-examination.¹²⁹

Until now, a competent prosecutor could prepare for trial, complying with Rule 16, the Jencks Act, *Brady* obligations, and other discovery orders of the court, with some sense of security in the knowledge that some evidence did not need to be turned over to the defense immediately. Rather, it could appropriately be held in reserve and available either for cross-examination or rebuttal purposes. It was a good check on a lying defendant—or a defendant that was particularly good at weaving his story around known facts.¹³⁰

Thus, the real issue of the other acts clause is the consequences that result from reading it to mandate full disclosure of a prosecutor's evidentiary arsenal. The ultimate consequence of interpreting other acts to include all extrinsic acts is that the prosecution's ability to challenge a defendant's testimony is significantly obstructed.

V. WHO IS RIGHT AND WHAT TO DO ABOUT IT

The two trends of relevant Rule 404(b) case law are that the majority of the courts implicitly recognize the rule's association with character¹³¹ and that

126. See *Tomblin*, 46 F.3d at 1388.

127. See *United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999).

128. Brief for Appellee *United States* at 23, *United States v. Castro-Zepeda*, No. 01-50606, 2002 U.S. App. LEXIS 23851 (9th Cir. Nov. 18, 2002).

129. *Id.*

130. *Id.* (citations omitted).

131. See *supra* discussion Part III.B.

there are conflicting interpretations of other acts.¹³² In trying to interpret other acts without much guidance, each court has marched uniquely across Rule 404(b) issues. The respective paths taken by these courts serve to demonstrate the errors and benefits of certain interpretations. When placed into the character context of Rule 404, the appropriate scope of other acts becomes clear.

The scope of other acts has to first be viewed through the overarching policy and basic tenet of Rule 404: character.¹³³ Interpreting the rule without regard to character flies in the face of the case law.¹³⁴ "Other crimes, wrongs, or acts," under the common law, the rulings of the U.S. Supreme Court in *Huddleston v. United States*,¹³⁵ and *Old Chief v. United States*,¹³⁶ and under the context of the rule itself, should not be read to encompass all acts without a character limitation. Unfortunately, the Ninth Circuit did just that in *United States v. Vega*.¹³⁷ The Court analyzed other acts without considering the rule's character relevance.¹³⁸ Therefore, the *Vega* interpretation should either be overlooked by courts considering the issue or flatly rejected.

However, *Vega*'s overbroad interpretation of other acts can be rationalized by the plain language of amended Rule 404(b) and its advisory committee notes. In analyzing the holding of *Vega*, it is difficult to see the court's efforts going beyond the plain language of Rule 404(b). On its face, without regard to context, the phrase other acts certainly extends to a limitless variety of acts. Also, a look at the advisory committee notes on the 1991 amendment superficially reveals that notice is required for all extrinsic act evidence used during a case-in-chief, for impeachment or possible rebuttal.¹³⁹ The *Vega* court's conclusions may be justified by a plain reading of the rule, but this potential justification is not enough.

"The lesson of famous cases . . . is that major public policy concerns require more from our judges than mere devotion to technical rules of evidence."¹⁴⁰ *Vega* pronounced Rule 404(b)'s governance over all other acts without considering the issue in detail.¹⁴¹ The court likely only relied on the plain language of the rule and its advisory committee notes, and it is unclear whether the court considered the full implications of its broad ruling. It appears the court either overlooked or ignored the character nature of Rule 404(b), thus

132. Compare *Vega*, 188 F.3d at 1154 (requiring notice of all extrinsic act evidence), with *United States v. Beverly*, 5 F.3d 633, 639 (2d Cir. 1993) (holding that defendant's invocation of Rule 404(b) to require notice of extrinsic act evidence was misplaced).

133. See generally FED. R. EVID. 404 (observing the title and context of the rule reveals its character foundation).

134. See *supra* discussion Part III.B.

135. 485 U.S. 681 (1988).

136. 519 U.S. 172 (1997).

137. 188 F.3d 1150 (9th Cir. 1999).

138. *Id.* at 1154.

139. See FED. R. EVID. 404(b) advisory committee's note on 1991 amendment.

140. Abraham P. Ordovery, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135, 139 (1989).

141. *Vega*, 188 F.3d at 1154.

denying itself the opportunity to view the issue as part of a “bigger picture.” Without considering the interplay between evidentiary rules, the court drastically changed the ability of prosecutors to effectively expose lying defendants.

The advisory committee notes on the 1991 amendments state, “The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b).”¹⁴² However, the interplay between Rule 404(b) and Rule 608(b) is particularly undercut by *Vega*, in contrast with the legislative intent of 404(b), because it elevates Rule 404(b) and eviscerates Rule 608(b).¹⁴³ There is no evidence that the drafters of the 1991 amendment envisioned the rule’s notice requirement to encompass the expanse of non-character-related, extrinsic act evidence offered to contradict a lying defendant, yet *Vega* and its progeny do just that.

A more reasoned approach has been taken by the Second and Fifth Circuits. In *United States v. Beverly*¹⁴⁴ and *United States v. Tomblin*¹⁴⁵ the courts incorporated the competing interests present among rules of evidence, criminal procedure, and public policy. Rather than giving a blind devotion to the plain language of Rule 404(b) and its advisory committee notes, *Beverly* and *Tomblin* recognize the parameters of the rule that allow an interpretation that is more compatible with the rule’s history and context.

The significance of *Beverly* and *Tomblin* is in the way they circumnavigate the scope of other acts by addressing whether the notice requirement should apply to extrinsic evidence offered to impeach by contradiction. *Beverly* stands for the proposition that a prosecutor should be allowed the opportunity to prove, on cross-examination, that a defendant has lied by introducing impeachment evidence without regard to Rule 404(b). Similarly, *Tomblin* stands for the notion that extrinsic act evidence used to impeach does not fall prey to Rule 404(b). These cases express the view that other act evidence used to impeach specific falsehoods does not implicate the notice requirement. Therefore, the scope of other acts is confined by the Second and Fifth Circuits’ respective exclusion of other act impeachment evidence from the rule’s notice requirement.

Therefore, the view that “other crimes, wrongs, or acts” includes all other acts without limitation is effectively combated on two fronts. First, the scope of other acts should result from Rule 404(b)’s application only to extrinsic evidence reflecting upon character. Second, extrinsic evidence used for impeachment by contradiction should not be subject to the rule’s notice

142. FED. R. EVID. 404(b) advisory committee’s note on 1991 amendment.

143. See generally *Vega*, 188 F.3d at 1154 (holding that any extrinsic act introduced to impeach is subject to Rule 404(b) and is not admissible without notice even though it may be proper under Rule 608).

144. *Beverly*, 5 F.3d at 639.

145. *Tomblin*, 46 F.3d at 1388.

requirement. Thus, the history of Rule 404, combined with the reasoning of *Beverly* and *Tomblin*, serves to control the scope of other acts from two sides: (1) character; and (2) impeachment by contradiction. Accordingly, the other acts clause should properly be read to include all extrinsic act evidence of other crimes, wrongs, or acts that *reflect upon character*, unless the offered evidence is introduced to *impeach a defendant by contradiction*. A clear statement from an appellate court reflecting these parameters for the scope of Rule 404(b)'s other acts would provide appropriate and needed direction for the future of other acts application.

VI. CONCLUSION

Extrinsic acts that do not raise a character inference do not come under the umbrella of Rule 404(b)'s provisions. Rule 404(b) analysis should be invoked by the courts only when evidence of "other crimes, wrongs, or acts" that reflects upon character is introduced to prove elements of an alleged crime. Although recent decisions have brought to life the dangerous wording of the amended rule and its advisory committee notes, the overbroad reach of the Ninth Circuit's decision in *United States v. Vega* only stresses the importance of a requisite character-link for offered other acts evidence. Other acts cannot logically be held to include reading a book, riding a bike, or any other act that suggests nothing about the character or propensity of a person to commit an alleged crime. Rule 404(b)'s ambiguous other acts clause must be read in the context of Rule 404's basic character component. Rule 404(b) is a product of Congress's intent to regulate the prejudicial effect of character evidence, but the continued judicial removal of character as a component of other acts has misguided the rule's intended application, to the detriment of both criminal prosecutors and justice.

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